

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DORLA F. NOKES,

Plaintiff,

v.

JO ANNE B. BARNHART, Commissioner of  
Social Security Administration,

Defendant.

CASE NO. C05-5834RBL

REPORT AND  
RECOMMENDATION

Noted for September 15, 2006

This matter has been referred to Magistrate Judge J. Kelley Arnold pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Magistrates Rule MJR 4(a)(4) and as authorized by Mathews, secretary of H.E.W. v. Weber, 423 U.S. 261 (1976). This matter has been briefed. In response to Plaintiff's opening brief, Defendant conceded certain errors and requests that the matter be remanded for further proceedings. After reviewing the record, Plaintiff's reply to Defendant's position, the undersigned recommends that the Court remand the Administration's final decision for further consideration.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, Dorla Nokes, was born in 1944. She completed High School and has had one year of training at a beautician school. (Tr.503). In March 1989, she began having problems with her legs, with numbness from the knees down. She was hospitalized for three days and referred to a neurologist and physical therapy. (Tr. 504). Mrs. Nokes was admitted to St. Peter Hospital March 7, 1989, with paresthesias in her lower extremities and an abnormal gait. (Tr. 366-385). Dr. Connolly, the consulting

1 neurologist, diagnosed a transverse myelitis<sup>2</sup>. (Tr. 372- 373). She was discharged on March 10, 1989 on  
2 prednisone. Plaintiff ceased working at that time, but in 1990, she took out a loan and started a gift shop,  
3 which she ran with the help of her husband and children. (Tr. 504). She did not work full-time, but worked  
4 three or four half-days per week. She did not take a salary from the business until 1999, when she took out  
5 \$650 per month to pay for the handicapped van she needed to transport herself and her wheelchair to  
6 work. (Tr. 505-506). She usually had two employees, and her granddaughter, son and husband all helped  
7 run the shop. (Tr. 514). Her husband kept the books for the business. (Tr. 515).

8 During the period January 1996 through September 1998, Dr. Gomez noted: tenderness in the  
9 lower extremities that he attributed to degenerative osteoarthritis of the knees; ear and head pain he  
10 attributed to sinusitis; and IBS symptoms. (Tr. 122-131). On September 21, 1998 he ordered an MRI of  
11 Ms. Noke's brain. (Tr. 122). The MRI evidenced a possibility of MS or a neoplasm. (Tr. 147). Another  
12 MRI of Mrs. Nokes brain was done on October 10, 2000, evidencing multiple stable deep white matter  
13 lesions, confirming multiple sclerosis ("MS").

14 Mrs. Nokes testified that she had MS symptoms during the period she owned the gift shop, when  
15 she had episodes of double vision when she could not drive or read. Plaintiff alleges disability since  
16 December 31, 1989 due to MS and arthritis (Tr. 20). Plaintiff filed her application for Title II disability  
17 insurance benefits in July 2001 (Tr. 42-44). Her application was denied (Tr. 27-29) and Plaintiff requested  
18 reconsideration, amending her alleged onset date to 1989 (Tr. 33-34). Plaintiff's application was denied  
19 again (Tr. 35-36) and she requested a hearing (Tr. 37-39). Her request for a hearing was dismissed as a  
20 reconsidered determination based on her revised date of alleged onset of disability had not been issued (Tr.  
21 290-93). Another reconsidered determination was issued denying her application (Tr. 300-302) and  
22 Plaintiff requested a hearing (Tr. 303). A hearing was held on March 24, 2005 (Tr. 499-527); Plaintiff,  
23 represented by an attorney, and her husband were present and testified. Also present at the hearing was  
24 Phillip R. Rodriguez, a vocational expert (Tr. 321-22, 520-26). The Administrative Law Judge (ALJ)  
25 issued a decision on April 11, 2005, finding that Plaintiff was not disabled within the meaning of the Social  
26 Security Act because she was capable of performing her past relevant work and, was therefore, not entitled  
27 to benefits (Tr. 19-25). Plaintiff requested review by the Appeals Council (Tr. 13-14) and the Appeals  
28 Council denied Plaintiff's request for review (Tr. 7-9), making the ALJ's decision the final decision of the

1 Commissioner. See 20 C.F.R. §§ 404.981, 422.210 (2005).

2 Plaintiff brings the instant action pursuant to 205(g) of the Social Security Act ("the Act"), as  
3 amended, 42 U.S.C. § 405(g), to obtain judicial review of the defendant's final decision denying plaintiff's  
4 application for disability insurance benefits. In her opening brief plaintiff specifically argued: (1) the ALJ  
5 improperly found that Plaintiff had engaged in substantial gainful activity in 1999; (2) the ALJ failed to  
6 properly consider Plaintiff's MS a severe impairment; (3) the ALJ failed to properly consider whether or  
7 not Plaintiff's MS met or equaled a Listed disability, specifically Listing 11.09 of the Listings; (4) the ALJ  
8 improperly determined plaintiff's Residual Functional Capacity; (5) the ALJ failed to properly develop the  
9 record, specifically the need to call a medical expert to testify at Plaintiff's hearing; (6) the ALJ failed to  
10 properly consider Plaintiff's credibility and the lay witness evidence; and (7) the ALJ misstated or  
11 misinterpreted the testimony of the vocational expert.

12 As noted above, Defendant concedes certain errors were made by the administration and asks the  
13 court to remand the matter for further proceedings. Specifically, Defendant states (i) the ALJ should  
14 reconsider whether or not Plaintiff's work activity in 1999 was substantial gainful activity; (ii) the ALJ  
15 should reassess Plaintiff's credibility and take the lay testimony into account; (iii) the ALJ needs to reassess  
16 Plaintiff's residual functional capacity; and (iv) based on the above, the ALJ should complete the disability  
17 determination process, particularly step-four.

18 Given the fact that the parties agree that the administration erred in its consideration of Plaintiff's  
19 application for social security benefits, the only issue before the court is whether or not the record is fully  
20 developed and if there is a useful purpose in remanding the matter for further proceedings. The  
21 undersigned finds the records has not been properly developed by the administration and the matter should  
22 be remanded to allow another ALJ the opportunity to properly complete the five-step evaluation process.

### 23 DISCUSSION

24 The decision whether to remand a case for further proceedings or simply to award benefits is within  
25 the discretion of the court. Harman v. Apfel, 211 F.3d 1172, 1176-1178 (9th Cir. 2000). An award of  
26 benefits is appropriate when no useful purpose would be served by further administrative proceedings, or  
27 when the record has been fully developed and there is not sufficient evidence to support the ALJ's  
28 conclusion. Rodriguez v. Bowen, 876 F.2d 759, 763 (9th Cir. 1989). Remand is appropriate where

1 additional administrative proceedings could remedy defects. Id.; Bilby v. Schweiker, 762 F.2d 716, 719  
2 (9th Cir. 1985) (*citing* Kail v. Heckler, 722 F.2d 1496, 1497 (9th Cir. 1984)). Where remand would only  
3 delay the receipt of benefits, judgment for the claimant is appropriate. Rodriguez, 876 F.2d at 763.

4 The Commissioner must following a five-step sequential evaluation process for determining  
5 whether a claimant is disabled. See 20 C.F.R. §§ 404.1520, 416.920.

6 Step One: The Commissioner determines whether the claimant is engaged in substantial gainful  
7 activity. See 20 C.F.R. §§ 404.1520(a)(4)(i), 404.1520(b), 416.920(a)(4)(i), 416.920(b). If so, the claimant  
8 is not disabled. If not, the Commissioner proceeds to step two.

9 Step Two: The Commissioner determines whether the claimant has a medically severe impairment  
10 or combination of impairments that significantly limits her physical or mental ability to do basic work  
11 activities. See 20 C.F.R. §§ 404.1520(a)(4)(ii), 404.1520(c), 416.920(a)(4)(ii), 416.920(c). If not, the  
12 claimant is not disabled. If so, the Commissioner proceeds to step three.

13 Step Three: The Commissioner determines whether the claimant's impairments meet or equal the  
14 requirements of a listed impairment in the Listing of Impairments, found at 20 C.F.R. pt. 404, subpt. P,  
15 app. 1. See 20 C.F.R. §§ 404.1520(a)(4)(iii), 404.1520(d), 416.920(a)(4)(iii), 416.920(d). If so, the  
16 claimant is disabled. If not, the process continues. Residual Functional Capacity: When a decision cannot  
17 be made based at any of the first three steps of the sequential evaluation process, the Commissioner  
18 determines the claimant's residual functional capacity (RFC) -- what the claimant can still do despite her  
19 limitations. See 20 C.F.R. §§ 404.1520(e), 404.1545, 416.920(e), 416.945. The Commissioner then  
20 proceeds to step four.

21 Step Four: The Commissioner determines whether the claimant can perform her past relevant work.  
22 See 20 C.F.R. §§ 404.1520(a)(4)(iv), 404.1520(f), 416.920(a)(4)(iv), 416.920(f).  
23 If so, the claimant is not disabled. If not, the Commissioner proceeds to step five. Step Five: The  
24 Commissioner determines whether the claimant can perform any other work existing in significant numbers  
25 in the national economy. See 20 C.F.R. §§ 404.1520(a)(4)(v), 404.1520(g), 416.920(a)(4)(v), 416.920(g).  
26 If so, the claimant is not disabled. If not, the claimant is disabled.

27 Here, the parties agree that the ALJ committed an error when he evaluated Plaintiff's work  
28 activities in 1999. The issue of Plaintiff's work activities while she owned and operated the gift shop are

1 not easily determined. It is equally difficult to evaluate and determine from the medical record exactly  
2 when Plaintiff's MS became disabling. Like other ailments, Plaintiff's MS appears not to have fully  
3 manifested until well after her alleged onset date of disability. As argued by Plaintiff, a medical expert's  
4 review and testimony in such a case would be useful to the administration's consideration of this case.

5 The court notes that the errors, agreed on by both parties, were made by the ALJ at steps one,  
6 two, three and four of the five-step evaluation process. Remanding the matter will not only allow the  
7 administration the opportunity reconsider its decision at each of these four steps, but it will further allow  
8 the full development and determination of step-five of the process. Accordingly, the matter should be  
9 remanded for further consideration. The administration shall make new findings and conclusions relevant  
10 to each of the five-steps in the evaluation process.

#### 11 CONCLUSION

12 Based on the foregoing, the Court should REMAND the matter for further proceedings, assigning a  
13 different administrative law judge. Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules  
14 of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written  
15 objections. *See also* Fed.R.Civ.P. 6. Failure to file objections will result in a waiver of those objections for  
16 purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by  
17 Rule 72(b), the clerk is directed to set the matter for consideration on **September 15, 2006**, as noted in the  
18 caption.

19 DATED this 24th day of August, 2006.

20  
21 /s/ J. Kelley Arnold  
22 J. Kelley Arnold  
23 U.S. Magistrate Judge  
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